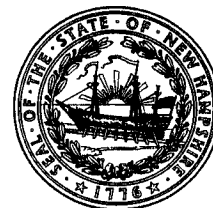




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Kurt Meisner, #1067
Meisner-Brem Corporation
151 Main Street
Salem, NH 03079

Re: CA1998008139, Salem, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND LICENSE ACTION
No. NPLA 06-001**

April 24, 2006

I. INTRODUCTION

This Notice of Proposed Administrative Fine and License Action is issued by the Department of Environmental Services, Water Division to Kurt Meisner. Pursuant to RSA 485-A:43 and NH Admin. Rule Env-C 600, the Division is proposing that fines totaling \$2,000 be imposed by DES against Kurt Meisner for the violations alleged below. Also, pursuant to RSA 485-A:35, I, the Division is proposing that DES revoke the septic system designer's license, #1067, based on the violations alleged below and for just cause. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Kurt Meisner is an individual holding septic designer's license No. 1067, employed by Meisner-Brem Corporation, having a mailing address of 151 Main Street, Salem, NH 03079.

III. SUMMARY OF FACTS AND LAW SUPPORTING PROPOSED ACTION

1. RSA 485-A:29 authorizes the Department of Environmental Services ("DES") to review and approve subdivisions of land, and design and installation of subsurface sewage disposal systems. RSA 485-A:35, I, authorizes the Commissioner of DES to license designers of subsurface waste disposal systems ("septic systems"). RSA 485-A:41 authorizes the Commissioner to adopt rules to implement the subsurface sewage disposal system program. Pursuant to this authority, the Commissioner has adopted NH Admin. Rules Env-Ws 1000.
2. Pursuant to RSA 485-A:43, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of RSA 485-A:29 through RSA 485-A:44, inclusive and including any rule adopted thereunder. Pursuant to this section, the Commissioner has adopted Env-C 604 to establish the schedule of fines for such violations.
3. DES issued subsurface sewage system construction permit number CA1998008139 dated April 30, 1998 ("the Permit") to Lawrence and Susan Levine, to allow the construction and installation of a septic system on their property located at 17 Nowell Court, Salem, New

Hampshire, more particularly described in Town of Salem tax maps as Map 21, Lot 5766 ("the Property").

4. Env-Ws 1003.13 requires that applicants for septic systems that require encroachment waivers must notify all abutters of the request for such waivers, pursuant to RSA 485-A:30-a.
5. Env-Ws 1002.26 defines "encroachment waiver" as a waiver of the design specification rules of Env-Ws 1000 et seq. which, if granted, would limit the ability of an owner of an abutting property to fully use his property for purposes of development. For purposes of this definition, "development" includes changes or additions to existing structures as well as construction of new structures, whether commercial or non-commercial.
6. RSA 485-A:30-a requires that applicants for septic systems that require encroachment waivers notify all abutters of the request for encroachment waiver. The notification must include:
 - a. The name and address of the property owner;
 - b. Identification of the property for which an encroachment waiver is being requested, including tax map and lot numbers; and
 - c. Names of abutters, together with applicable tax map and lot numbers.
7. Env-Ws 1004.19(a) states that information provided to justify the issuance of an approval, including a request for encroachment waiver, is assumed to be true and accurate.
8. RSA 485-A:32, I and II authorize municipalities to review septic system applications for compliance with local ordinances prior to submitting those applications to DES for approval. The Town of Salem is listed as a "prior approval" town, and employs Mr. Joseph Chamberlain to review septic system plans for accuracy prior to submission of those plans affecting failed septic systems to DES for review and approval.
9. Joseph Chamberlain was an authorized agent of DES with authority to review, inspect and approve plans submitted for the construction of septic systems in the Town of Salem, during the period of time encompassing the events in question. Mr. Chamberlain is fully knowledgeable about the requirements for approval of individual septic systems.
10. On February 12, 1998, the Meisner-Brem Corp., through Kurt Meisner, licensed septic designer #1067, submitted an application for replacement of a septic system located on the Property to DES for review and approval. The request was to replace a failed septic system with a new system.
11. The application included a request for an encroachment waiver on property owned by Sidney Wolk, located at 15 Nowell Court, identified on Town of Salem tax maps as Map 21, Lot 5765.
12. Mr. Meisner forwarded an encroachment waiver signed by Mr. Sidney Wolk, dated February 27, 1998 to DES.
13. Based on the information provided by Mr. Meisner, including additional information

requested by the Division, DES approved the application on April 8, 1998.

14. Subsequent to issuance of the approval, the Division received information that clearly demonstrates that the application that was approved by DES for this septic system contained significant errors.

15. The application identified only one abutting property owner, Sidney Wolk. There are two abutting property owners, Mr. Wolk, and Phillip and Georgette Smith.

16. The application incorrectly identified Mr. Wolk as the owner of the property that would be burdened by the encroachment waiver. In fact, Phillip and Georgette Smith own the property that is now burdened by the encroachment waiver.

17. The application incorrectly listed the tax map and lot number of the burdened property as Map 21, Lot 5765. The correct tax map and lot number for the burdened property is Map 21, Lot 5768.

18. Based on information received from the Smiths, the Town of Salem was notified of this error.

19. According to information received from Phillip and Georgette Smith, Town officials promised that the application would be corrected to reflect their ownership of the burdened property prior to submission of the plans to the Division for review and approval.

20. Due to the failure to correct the application prior to submission to the Division, the Smiths were not afforded an opportunity to object to issuance of the encroachment waiver prior to DES approval of the plan and granting of the encroachment waiver.

21. The Division has received a copy of a lot line adjustment plan developed for the Smith property in Salem by the Meisner-Brem Corporation. The plan is dated January 3, 1995. This plan indicates that the Meisner-Brem Corporation and Kurt Meisner had knowledge that the Smiths owned the property burdened by the proposed encroachment waiver prior to submission of the Levine plan to the Town of Salem and the Division.

22. The Division has received a copy of a certified plot plan developed by the Meisner-Brem Corporation for the Levines dated May 21, 1998. On that plan, the Smiths are correctly identified as the owners of the property burdened by the encroachment waiver.

23. The Division has received information indicating that the size of the lot as stated on the Meisner-Brem plan is incorrect, and that the location of a previous septic system on the Levine lot is also incorrect.

24. The Division has received amended plans from Kurt Meisner of the Meisner-Brem Corp., seeking to cure the defects in the original application. The Division believes that the amended plans continue to reflect inaccurate information regarding lot size, descriptions of the property, nature of the use of the property (seasonal or year round) and location of the former septic system on the Property.

25. Based on the above facts, the Division believes that the information upon which DES based its approval of permit CA1998008139 was not true and complete or was misleading. Env-Ws 1004.19(b).

26. Based on further information received in the course of litigation in Merrimack County Superior Court relative to a related matter, the Division believes the untrue information regarding the property burdened by the encroachment waiver was provided by Kurt Meisner to intentionally mislead DES.

IV. VIOLATIONS ALLEGED, PROPOSED LICENSE ACTION, AND ADMINISTRATIVE FINE(S)

1. Kurt Meisner has knowingly produced erroneous and/or fallacious data with regard to the application for the Permit from DES to replace a failed septic system on the Property, and bears full responsibility for same, as contemplated is RSA 485-A:43, I & II.
2. Based on the violation(s) identified above and for just cause, the Division proposes that DES suspend, revoke or refuse to renew septic designer license #1067 issued to Kurt Meisner, pursuant to RSA 485-A:35, I.
3. Based on the violation(s) identified above, the Division proposes that DES impose an administrative fine upon Kurt Meisner in the amount of \$2,000, pursuant to RSA 485-A:43, V, and Env-C 604.02(d).

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, Respondent is required to respond to this notice. Please respond no later than May 29, 2006 using the enclosed colored form.

Respondent has the right to a hearing to contest these allegations before the proposed license action is taken or any administrative fine is imposed. The hearing would be a formal adjudicative proceeding pursuant to RSA 541-A:31, at which Respondent and any witnesses Respondent may call would have the opportunity to present testimony and evidence as to why the proposed action should not be taken. All testimony at the hearing would be under oath and would be subject to cross examination. If Respondent wishes to have a hearing, one will be scheduled promptly.

If the Permit is an occupational license, under RSA 541-A:31, III(f) Mr. Meisner has the right to request DES to provide a certified shorthand court reporter at Mr. Meisner's expense. **Such request must be submitted in writing at least 10 days prior to the proceeding.**

Mr. Meisner may waive his right to a hearing. If Mr. Meisner waives the hearing, DES is prepared to revoke the Permit. Mr. Meisner should notify DES of his decision by filling out and returning the enclosed form by **May 29, 2006**.

RSA 541-A:31, III(e) provides that Respondent has the right to have an attorney present to

represent Respondent at Respondent's expense. Respondent is not required to be represented by an attorney. If Respondent chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

1. If Respondent would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If Respondent wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance form, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If Respondent chooses to waive the hearing, relinquish the permit to operate and/or pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Respondent committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Respondent committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Respondent proves, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** Respondent did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Respondent did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Respondent was making a good faith effort to comply with the requirement that was violated.
3. Respondent has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Respondent's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that **Respondent** committed the violation(s) alleged above, that the proposed license action be taken and proposed fine(s) be imposed. **The hearing is Respondent's opportunity to present testimony and evidence that Respondent did not commit the violation(s), that the proposed license action should not be taken and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If **Respondent** has any evidence, such as photographs, business records or other documents, that **Respondent** believes show that **Respondent** did not commit the violation(s) or that otherwise support **Respondent's** position, then **Respondent** should bring the evidence to the hearing. **Respondent** may also bring witnesses (other people) to the hearing to testify on **Respondent's** behalf.

Information regarding this proposed administrative fine and license action may be made available to the public via the DES Web page (www.des.nh.gov). If **Respondent** has any questions about this matter, please contact the DES Legal Unit at (603) 271-7509.

COPY

Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
James Martin, DES Public Information Officer
William E. Evans, P.E., Administrator, DES/SSB
Richard J. de Seve, DES/SSB
cc: Gretchen Hamel, Administrator, DES Legal Unit
Board of Selectmen, Town of Salem
Brian Lockard, Health Officer, Town of Salem
Phillip and Georgette Smith
Lawrence and Susan Levine
Sidney Wolk

***** RETURN THIS PAGE ONLY *****

**KURT MEISNER IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN MAY 29, 2006

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Kurt Meisner:

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Kurt Meisner:

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine(s) and that I hereby waive those rights. The fine payment in the amount of \$2,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed license action and that I hereby waive those rights and relinquish septic designer license #1067.

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature _____ Date _____
Name (please print or type): _____
Title: _____
Phone: _____

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

**DES Legal Unit
Attn: Michael Sclafani, Legal Assistant
P.O. Box 95
Concord, NH 03302-0095**

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

CO-2

2002

Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.